

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Original & Affidavit
of Mailing*

77-1134

To be argued by
EDWARD R. KORMAN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

—against—

GEORGE MOSS and AMERICAN IDENTIFICATION
PRODUCTS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

EDWARD R. KORMAN,
*Chief Assistant United States Attorney
Of Counsel.*

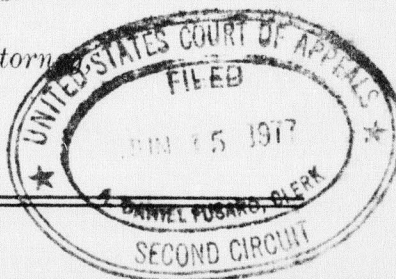




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
The Evidence at Trial	3
Counts One and Two	3
Counts Three and Four	8
Count Six	9
Count Seven	10
Counts Eight and Ten	13
Count Nine	15
Counts Eleven and Twelve	17
Count Fourteen	19

ARGUMENT:

POINT I—The Evidence Was Sufficient to Sustain the Conviction of the Defendant on all but Count Three	21
POINT II—The Untimely Claim of the Appellant Moss that the Convictions on the Substantive Counts Were Multiplicitous Does Not Entitle Him to any Relief	22
POINT III—The Use Made of Appellant Moss' Prior Bankruptcy Testimony to Which No Timely Ob- jection Was Taken Was Entirely Proper	28
A. The Protection Afforded By the Self-Incrim- ination Clause	29
B. The Protection Afforded By The Statute ..	35
C. The Absence of an Objection	39

	PAGE
POINT IV—The Error as to Moss, if any, Did Not Affect the Appellant American Identification Products	41
CONCLUSION	42

TABLE OF CITATIONS

Cases:

<i>Alkon v. United States</i> , 163 F. 810 (C.A. 1, 1908) ..	38
<i>Anderson v. United States</i> , 6 Cir., 189 F.2d 202, (C.A. 6, 1951)	23
<i>Arndstein v. McCarthy</i> , 254 U.S. 71 (1920) ..	36, 38, 39
<i>Bain v. United States</i> , 262 F. 664 (C.A. 6, 1920), <i>cert. denied</i> , 252 U.S. 586 (1920)	40
<i>Barnes v. United States</i> , 412 U.S. 837 (1973)	23
<i>Bell v. United States</i> , 349 U.S. 81 (1955)	28
<i>Burrell v. Montana</i> , 194 U.S. 572 (1904)	36, 40
<i>Dyer v. McDougall</i> , 210 F.2d 265 (C.A. 2, 1952) ..	13
<i>Edwards v. United States</i> , 265 F.2d 302 (C.A. 9, 1959)	25, 26
<i>Glickstein v. United States</i> , 222 U.S. 139 (1911) ..	31
<i>Gore v. United States</i> , 357 U.S. 386 (1958)	28
<i>Harris v. New York</i> , 401 U.S. 222 (1971) ...	31, 34, 35
<i>Kritcher v. United States</i> , 17 F.2d 704 (C.A. 2, 1927)	40
<i>Lego v. Twomey</i> , 404 U.S. 477 (1972)	35
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	35
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	33
<i>People v. Varnum</i> , 59 Cal. Rptr. 108, 427 P.2d 772, (Sup. Ct. of Calif., 1967)	42

	PAGE
<i>Prince v. United States</i> , 352 U.S. 322 (1957)	27
<i>Rayborn v. United States</i> , 234 F.2d 368 (C.A. 6, 1956)	28
<i>Rogers v. Richmond</i> , 365 U.S. 534 (1961)	34
<i>Shotwell Mfg. Co. v. United States</i> , 371 U.S. 341 (1963)	33, 34
<i>Simmons v. United States</i> , 390 U.S. 377 (1968)	30
<i>United States v. Branker</i> , 418 F.2d 378 (C.A. 2, 1969)	30
<i>United States v. Bruton</i> , 416 F.2d 310 (C.A. 8, 1969)	41
<i>United States v. Calvert</i> , 523 F.2d 895 (C.A. 8, 1975), <i>cert. denied</i> , 424 U.S. 911 (1976)	27
<i>United States v. Dornau</i> , 491 F.2d 473 (C.A. 2, 1974)	28, 29, 36
<i>United States v. Eskow</i> , 422 F.2d 1060 (C.A. 2, 1970), <i>cert. denied</i> , 398 U.S. 959 (1970)	27
<i>United States v. Hendrix</i> , 505 F.2d 1233 (C.A. 2, 1974)	35
<i>United States v. Hockenberry</i> , 474 F.2d 24 (C.A. 3, 1974)	35
<i>United States v. Housand</i> , 550 F.2d 8 (C.A. 2, 1977)	34
<i>United States v. Indiviglio</i> , 352 F.2d 276 (C.A. 2, <i>en banc</i> , 1965), <i>cert. denied</i> , 383 U.S. 907 (1966)	40, 41
<i>United States v. Jacobs</i> , 161 F. 694 (1908) . .	37, 38, 39
<i>United States v. Kakan</i> , 415 U.S. 239 (1974) . .	30, 31, 32, 33, 35
<i>United States v. Kaldenberg</i> , 429 F.2d 161 (C.A. 9, 1970), <i>cert. denied</i> , 404 U.S. 929	26
<i>United States v. Knickerbocker Fur Coat</i> , 66 F.2d 388 (C.A. 2, 1933)	24
<i>United States v. Long</i> , 524 F.2d 660 (C.A. 9, 1975)	28

	PAGE
<i>United States v. Manning</i> , 448 F.2d 992 (C.A. 2, 1971), <i>cert. denied</i> , 404 U.S. 995 (1971)	41
<i>United States v. Private Brands, Inc.</i> , 250 F.2d 554 (C.A. 2, 1957), <i>cert. denied</i> , 355 U.S. 957 (1958)	22, 23
<i>United States v. Rinaldi</i> , 393 F.2d 97 (C.A. 2, 1968)	42
<i>United States v. Rose</i> , 525 F.2d 1026 (C.A. 2, 1976)	40
<i>United States v. Toscanino</i> , 500 F.2d 267 (C.A. 2, 1974)	34
<i>United States v. Tramunti</i> , 500 F.2d 1334 (C.A. 2, 1974)	31, 32, 33, 35, 37, 39, 40, 41
<i>United States v. Viale</i> , 312 F.2d 595 (C.A. 2, 1963)	40
<i>United States v. Weinstein</i> , 452 F.2d 704 (C.A. 2, 1971), <i>cert. denied</i> , <i>sub nom. Grunberger v. United States</i> , 406 U.S. 917 (1972)	12
<i>United States v. White</i> , 417 F.2d 89 (C.A. 2, 1969)	23, 24

RULES AND REGULATIONS

Federal Rules of Evidence, Rule 607	42
Federal Rules of Evidence, Rule 801(d)(1)	42

STATUTES

T. 11, U.S.C. § 25(a)(10)	28, 35, 36, 37
T. 18, U.S.C. § 152	25
T. 18, U.S.C. § 3284	26
T. 18, U.S.C. § 6002	36

OTHER AUTHORITIES

Criminal Law—Bankruptcy Evidence, 22 ALR Fed. 643	39
---	----

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

—against—

GEORGE MOSS and AMERICAN IDENTIFICATION PRODUCTS,
Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal from a judgment entered on February 28, 1977 by the United States District Court for the Eastern District of New York (Platt, J.) which convicted appellant Moss after a jury trial, of eleven substantive counts of bankruptcy fraud under 18 U.S.C. § 152 and one count of conspiracy to violate that section. Moss was sentenced to two years imprisonment, with eighteen months suspended, and to a fine of \$1,000 on each count, amounting to a total fine of \$12,000. The appellant, Moss, is presently out on bail pending the outcome of this appeal. The appellant, American Identification Products, was convicted on one count of fraudulently receiving property from a bankrupt under 18 U.S.C. § 152 and was sentenced to a fine of \$5,000.00.

Statement of the Case

This case involves a carefully planned bankruptcy fraud capped by concededly perjurious testimony given by the appellant George Moss, before the Bankruptcy Court on behalf of Stafford Manufacturing Co. (hereinafter Stafford), the bankrupt corporation of which he was a principal. Briefly, the evidence showed that Stafford's debts had substantially exceeded its assets (S.A. 214) and it was forced to apply for relief under Chapter XI of the Bankruptcy Act (S.A. 86, 87). Such an application was made and Stafford was declared a debtor in possession on August 10, 1970 (S.A. 3). But George Moss did not fully comply with the obligations which he assumed on behalf of Stafford, and his behavior was, at best, suspicious. During 1971 Moss cashed checks in excess of \$46,000 payable to Stafford for cash at a friend's cashing service (S.A. 236). Additionally, more than \$900.00 was cashed in grocery stores throughout the Great Neck, New York area (S.A. 231). Although Moss claimed that he used the money to pay off various creditors and unpaid employees (S.A. 231), he never informed the Bankruptcy Court of these transactions (T. 1325-6).

Finally, on August 10, 1972, Stafford was adjudicated bankrupt (S.A. 3), and a trustee was appointed to take possession of the assets and reduce it to cash (S.A. 1-3). But Moss worked on a carefully planned scheme to conceal the assets of the bankrupt and transfer its property to a successor corporation which he had founded, the appellant American Identification Products (hereinafter American Identification). The scheme culminated with what he would admit at trial was false testimony before the Bankruptcy Court (S.A. 241, 270-1, 281).

On this the defendant challenges the sufficiency of the evidence on all but three of the substantive counts

of the indictment Counts Two, Four and Nine and argues that the indictment was multiplicitous. Moreover, he also challenges the use that was made of his prior testimony under a grant of limited use immunity before the Bankruptcy Court.

We shall below detail the nature of the evidence on each of the counts of the indictment, and in so doing also make reference to the use that was made of the appellant's testimony. We apologize if we appear to be argumentative at times, but it seems preferable to a repetitive discussion of the sufficiency of the evidence in the argument part of the brief.

The Evidence at Trial

Counts One and Two

In Count One, appellant George Moss was charged with the concealment of a G.M.C. truck in contemplation of bankruptcy on or about but not later than August 10, 1972, while Count Two charged him with the continuing concealment of the truck from the trustee and the creditors (A. 9-10).

The evidence showed that in January 1967, Moss, acting on behalf of Stafford, purchased a yellow 1967 G.M.C. truck bearing serial numbers C6945F (T. 19-27). Although the truck was shown to be registered (Gov. Ex. 17, S.A. 400) and used in the normal course of business by Stafford during the year 1972-1973, the trustee was never informed of its existence (A. 64-73). Sometime early in August of 1972, Arpad Seifer, a long time employee of appellant, was directed to transport the truck some thirty miles east of Brooklyn to the S & M Fuel Oil Company (hereinafter S & M) on Long Island. There,

pursuant to an agreement between co-defendant Arnold Rubin, acting at appellant's direction (S.A. 276) and the owners of S & M, the truck was stored for the months of August through December. In December, the truck was towed to a nearby gas station (S.A. 21), where it was repaired and stored until March 1973 (S.A. 22-28). At that time Nat Moss contracted with the John Hilbrant Auto Body Shop in Lynbrook for the truck to be stripped of any indicia of previous ownership (S.A. 26), and re-painted "American Flag Blue" (S.A. 26). When the job was completed, appellant directed Seifer to retrieve what he described as a new truck (S.A. 17) and directed him to give Hilibrant a check in payment for its purchase (S.A. 18). The check received by Hilibrant was in fact in payment for the paint job and was signed by appellant (Gov. Ex. 73, S.A. 29-30). When Seifer retrieved the "new" truck, however, he noticed something similar about it (S.A. 18), and when he started the vehicle with a spare key he had retained to the old truck, his suspicions that this blue truck was in fact the old yellow truck were confirmed (S.A. 18).

In September 1975, when the F.B.I., pursuant to a warrant, searched American Identification, they located a blue 67 G.M.C. truck (T. 983) which, according to the Department of Motor Vehicles, bore the serial number C6946F (S.A. 67). This, indeed, was the same yellow truck which Stafford had purchased back in January of 1967.

On direct examination Moss testified that he had not concealed the truck (S.A. 143) and on cross-examination he originally stated that American Identification had not purchased it (S.A. 241). But, when confronted with the name "John Maxwell" (S.A. 243), Moss suddenly changed his tune. He reluctantly admitted that American Identi-

fication had purchased the truck from John Maxwell (S.A. 242), that John Maxwell was not present during the transaction (S.A. 245-6), and that he, George Moss, signed Maxwell's name to the document of transfer (S.A. 247).

Government Ex. 80, a State of New York Department of Motor Vehicles affidavit of sale or transfer, dated December 6, 1972, was introduced at this point (Gov. Ex. 80, S.A. 465-6). It showed the signatures of the seller, John Maxwell, the purchaser, R. Gorecki, on behalf of American Identification, and was notarized and signed by Lothar H. Szerlip, Moss' uncle (S.A. 249). At this point the following colloquy took place (S.A. 249).

Q. Now prior to the time—by the way, you signed this under oath Mr. Moss?

A. I signed that, yes sir.

Q. Under oath, Mr. Moss?

A. Oath to whom, sir?

Q. Mr. Szerlip.

A. No, I signed everything.

Q. You signed all the names to this?

A. Yes, I did.

Q. You signed Gorecki's name?

A. I signed everything.

Q. You signed his name as well.

A. Yes.

Q. Did you sign Lothar Szerlip, yes or no?

A. Yes, I did (S.A. 251).

Government Ex. 81 was an additional State of New York Department of Motor Vehicles affidavit dated

March 17, 1972 and was introduced at this point. It bore the sworn signatures of seller George S. Moss, on behalf of Stafford, and the purchaser, John Maxwell. It too was signed and notarized by Moss' uncle Lothar Szerlip (Gov. Ex. 80, S.A. 407-8). Again Moss confessed that he had forged the entire document (S.A. 254).

Under further cross-examination he admitted that he had actually made out checks (Gov. Ex. 82, S.A. 409-16) in the sum total of \$850.00 to John Maxwell in payment for this truck, that he later forged Maxwell's signature to these checks (S.A. 256) and cashed them (Gov. Ex. 82, S.A. 256). Yet Moss stated that he had never in the past lied to anyone about the sale of the truck (S.A. 265).

Moreover, under questioning to which no objection was made, Moss admitted that he had falsely testified before the Bankruptcy Court in April of 1973 that the truck had been sold by his brother early in 1972 (Gov. Ex. 88, S.A. 421-62, 268-70). Moss then conceded that he lied in the earlier proceeding (S.A. 270-1).

Q. Are you telling us now, sir, that at that time in April of 1973, you didn't know that you sold the truck to John Maxwell, sir?

A. Both the answer I gave there——

Q. Were you lying then, sir?

A. I wasn't telling the truth there.

Q. Is it a lie when you don't tell the truth?

A. Yes, it is.

Q. So you perjured yourself, sir, isn't that right?

A. It's a harsh word.

Q. It sure is. Did you perjure yourself then Mr. Moss? Yes or no?

A. Yes. (S.A. 270-1).

In short, there was overwhelming evidence that Moss had masterminded a very carefully drawn-out scheme to defeat the bankruptcy law.

There was, however, additional evidence that Moss had in fact concealed this truth in contemplation of bankruptcy. Although Alpa Seifer testified that Moss had directed him to move the truck and some machinery to Long Island on August 11, 1972, he admitted that he was uncertain about the particular date (S.A. 19). Moreover, when further urged on cross-examination for this time, Seifer estimated two or three weeks before the tagging had begun on August 21, 1972 (S.A. 581), which would leave Seifer's approximate date at anywhere between August 1, 1972 and August 7, 1972, clearly before the date of adjudication.

Moreover, the evidence showed that four \$25.00 Galgan Realty Corp. checks (Ex. 23, 24, 25, 26) were made out by Lynore Moss and made payable to S & M in payment for the storage of the truck. Each check was in payment for the previous month's storage and carried a notation to that effect. The check marked Ex. 23 was dated September 8, 1972, and a notation in the upper left-hand corner read "Truck storage *thru* August 31/72" (Ex. 23, S.A. 401-2); (emphasis added). Clearly it was reasonable for the jury to infer that the agreement predated the actual storage which was shown to have begun in August of 1972.¹

¹ The testimony of Mr. Steiner who rented the storage space (A. 75), is of little aid in ascertaining when this agreement actually occurred, for as appellant explains, the references to December are presumably typographical errors. While appellant contends that references to December actually mean September, this is simply speculation. As noted above (p. 7), there is clear evidence that this agreement was made prior to September, for as Gov. Ex. 23 shows, there was actual rental during the month of August.

Counts Three and Four

Count Three charged the appellant George Moss with the fraudulent concealment of a 1969 Chevelle Station Wagon in contemplation of bankruptcy on or about but not later than August 10, 1972, while Count Four charged a continuing concealment (A. 10-11).

The evidence showed that Moss purchased the vehicle on behalf of Stafford in 1968 (T. 28-33) but that the trustee never heard of its existence, and the auctioneer never sold it (A. 111). But in September of 1975, the F.B.I., in search of American Identification, located the vehicle and the investigation revealed that it was in fact registered in the name of American Identification (S.A. 68-70). This registration had been signed by George Moss (S.A. 70).

Here again, as was true with respect to the vehicle involved in Counts One and Two, Moss admitted that he had in fact forged documents to make it appear that in March of 1972 the car was sold to the same mysterious John Maxwell who had allegedly purchased the 67 truck (Gov. Ex. 83, S.A. 261-2, 417-18), and that Moss forged additional documents which showed that Maxwell had sold the vehicle to American Identification (Gov. Ex. 84, S.A. 262, 419-20) in December of 1972. Moss admitted forging the signatures of both John Maxwell and Lothar Szerlip on each of these documents (S.A. 262). At trial, Moss again admitted that he had perjured himself, and that he had lied to the bankruptcy referee about the car (S.A. 270-1). Clearly the evidence established that Moss had concealed the station wagon from the trustee and the creditors.

Although there is some evidence from which the jury could have concluded that Moss had actually concealed the station wagon in contemplation of bankruptcy, as

alleged in Count Three, the evidence is concededly weak, and we do not oppose reversal of the conviction on that count.

Count Six

Count Six charged the concealment from the Trustee of a Clark fork-lift type truck.² The evidence at trial clearly established that a Clark fork-lift of standard color green was delivered to Stafford on a lease-purchase arrangement in the year 1964. While this four thousand pound piece of machinery was neither present when property was being tagged by the auctioneer (A. 112), nor when Mr. Knitzer performed his appraisal (S.A. 49-50), appellant Moss conceded that the fork-lift became the property of Stafford. Moreover, appellant Moss also conceded that this same fork-lift was the one seized by the F.B.I. on the premises of appellant American Identification Products which he also controlled. These circumstances without more, along with evidence of other conceded acts of concealment by the defendant, described earlier, surely sufficed to establish that it was he who was responsible for concealing this four thousand pound fork-lift. There was, however, more. The United States offered direct testimony by Arpad Seifer that this fork-lift had been purposely hidden by George Moss, the defendant, that it was locked in a separate room, that affixed to the only access to this room was a sign which read Galgan Realty, that by so affixing this sign it was made to appear to anyone interested in locating assets of Stafford that this room was in itself a separate and distinct business, having nothing to do with Stafford and thus not subject to the inspection of either the auctioneer's workers or the appraiser (A. 57-58).

² Count Five, which charged the prior concealment of this fork-lift in contemplation of bankruptcy, was dismissed on the government's motion (T. 1130).

The appellant's effort to avoid the impact of this testimony is unavailing. His own testimony regarding the actual nature of Galgan Realty's occupancy of the premises (A. 201-05) proves nothing, since it was the picture that was created and which the auctioneer's workers and the appraiser confronted when they sought the assets that is critical. The picture painted by Seifer was not rebutted.

Moreover, while appellant suggests that there was an inconsistency between Seifer's trial and grand jury testimony as to who specifically had given the orders to hide the fork lift, the critical fact which corroborates his testimony is that the fork-lift, like other property belonging to Stafford, mysteriously found its way to the appellant American Identification Products without the detail of a bona-fide purchase.

The appellant Moss offered absolutely no explanation as to how this fork-lift had ever come into the possession of American Identification. While he contends that "the natural inference is that he assumed that American Identification had purchased the fork-lift with other pieces of equipment at the auction sale" (Br. p. 10), this inference is hardly compelling in view of the evidence depicting Moss as being in complete control over "financial" operations at both Stafford and American Identification (S.A. 191, 399).

Count Seven

Count Seven involved concealment of three Benchmaster presses, which were discovered on the premises of American Identifications Products and which were not accounted for by a bona-fide sale. While appellant clouds the issues with confusing technical differences between so-called "bench presses, punch presses, drill presses and

so-forth" (Br. p. 14), the evidence shows that such distinctions are quite unnecessary.

In 1969, Martin Fein, the auctioneer, while acting on behalf of the United Credit Corporation, did an appraisal on all of Stafford's property which served as the basis for a factor loan applied for by Stafford. In the course of this appraisal, he listed seven machines bearing the trademark "Benchmaster power press" (Ex. 44; S.A. 403). What a "Benchmaster power press" is or how it compares to a drill press or a punch press is really unimportant, because as a result of Mr. Fein's 1969 appraisal these seven machines were identifiable by some other more definite indicia. On each of these seven machines Mr. Fein found a serial number which he subsequently recorded on his appraisal sheet (Gov. Ex. 44; S.A. 403).

Later, in 1972, when Mr. Fein, as auctioneer, conducted an additional inventory of the Stafford premises, he found just four of these previously identified machines (S.A. 59). The following exchange shows that Fein made a specific search for those machines that were present in 1969 (S.A. 58-59):

THE WITNESS: When I walked in to tag up I gave my men a copy of the appraisal that I and from 69.

THE COURT: I see.

THE WITNESS: To see if everything that I had appraised in 1969 was on the premises in 72.

They came up three short. I have a notation on that (S.A. 59).

Mr. Fein's *pre*-auction sale inventory plainly established that three Benchmaster presses—with designated

serial numbers had been disposed of by Stafford prior to the auction sale. Hence appellant's effort to suggest that these three Benchmaster presses had somehow been sold at the auction sale (Br. pp. 14-15) is without substance.

Moreover, although it is conceded that the four machines which were present both in 1969 and in 1972 were properly purchased by American Identification (T. 593-5), when the F.B.I. pursuant to a warrant searched the premises of American Identification they reported finding seven pieces of machinery bearing the label "Benchmaster" (T. 947, 991-1001). More importantly is the fact that six of these machines bore identification numbers that were listed in Mr. Fein's 1969 appraisal (T. 991-1001). The serial number of the seventh machine could not be made out (T. 996).

Clearly, then, at least two of these machines were not purchased at the 1972 auction, but were otherwise obtained. Moreover, there was ample evidence to suggest that the appellant Moss was involved in concealing these presses from the trustee in bankruptcy.

There was not only the undisputed evidence of his concealment of other property, and the transfer of that property to his newly formed business, American Identification, but Moss himself conceded that he directed the moving of machinery out of the Stafford plant (A. 168-77, 183). While he contended that the machinery moved were old pieces of equipment that had belonged to his father (A. 168-77, 183), the jury was clearly entitled to believe otherwise, particularly because the credibility of the defendant has been so seriously undermined by his admission that he had perjured himself when he was examined pursuant to 11 U.S.C. § 25 (a) (10) (Tr. 1333-75). See *United States v. Weinstein*, 452 F.2d 710, 714, n. 14 (C.A. 2, 1971), *certiorari denied*,

sub nom. Grunberger v. United States, 406 U.S. 917 (1972); *Dyer v. McDougall*, 201 F.2d 265-268, 269 (C.A. 2, 1952). Indeed, during his earlier testimony before the Bankruptcy Court, he had falsely denied moving any machinery out of the Stafford plant (A. 246-48).

Finally, Arpad Seifer, a former employee of Stafford, testified (S.A. 14-15) that in August, 1972, at appellant's direction, he removed "[t]wo punch press machines and a die press machine, two drill presses" from Stafford's premises. Clearly it was reasonable for the jury to believe that these "presses" were the very machines that were present in 1969, but missing in 1972, particularly in light of the evidence that American Identification had received at least two pieces of machinery in some illegal way.

Nor does Seifer's testimony before either the bankruptcy referee or the Grand Jury subtract from this inference, for Moss himself admits having directed the removal of some machinery (A. 168-177, 189). Just what that machinery was was for the jury to decide.

Counts Eight and Ten

The facts show that on May 24, 1972 (S.A. 43), Stafford entered into a contract with Surless Ship Repairs of Brooklyn wherein Stafford was to manufacture, supply and install a number of damage control plates aboard two vessels (S.A. 40); that work on this contract had not yet been completed as of August 10, 1972, the day that Stafford had been adjudicated (S.A. 44); that on September 1, 1972, Surless was in receipt of an invoice for work performed on this May 24, 1972 contract for the sum of \$1,000 (Gov. Ex. 30; S.A. 32); that this invoice was on the letterhead of the bankrupt Stafford

(Gov. Ex. 30; S.A. 33); that a check was issued in the amount of \$1,000 in payment of this invoice on September 1, 1972 (Gov. Ex. 31; S.A. 34), and it is the concealment of this check which was the subject of Count Eight. Further, some time later, Surless was in receipt of an additional invoice for the completion of the work on the May 24, 1972 contract (Gov. Ex. 32; S.A. 37); that this invoice also bore the name of the bankrupt Stafford; that Surless issued a check in the amount of \$1500.00 (Gov. Ex. 33; S.A. 38) and that it is the concealment of this check which is the subject of Count Ten.

None of the proceeds from these checks was ever received by a filed creditor of Stafford. Indeed, Max Goldhaber, the trustee, was never informed of the existence of either of these checks (S.A. 7).

The record reveals that appellant Moss did, however, have knowledge of these checks; that he had in fact cashed these checks at the friendly H & S Cash Checking Service (S.A. 168-9). His explanation for these acts were that he himself, with the aid of a couple of sailors (S.A. 293) had installed the plates and that he, not Stafford, was entitled to the checks which he claimed were only for the installation work.

But Pat DiSimone, whose job at Surless was to issue contracts to subcontractors (S.A. 31), and who had in fact performed this function in relation to the May 24, 1972 contract with Stafford (S.A. 31), testified that the contract was "lump sum" in nature:

Q. When you entered into the original contract with Stafford Manufacturing, what items did it cover on the part of Stafford Manufacturing?

A. The manufacturing of label plates, the furnishing of label plates, and I think it also included

the manufacturing of the preparation of the drawings, and installing the label plates according to the required ship specifications.

Q. What portion of the total contract price was allocated to installation?

* * * * *

A. I couldn't tell you. It was a lump sum contract (T. 463).

Nor is there any support for appellant's assertion that he had installed these plates. None of the sailors testified to this fact, and Pat DiSimone could not say that he had seen Moss perform the installation (S.A. 41). In view of the fact that DiSimone testified that part of the payment was in fact for work completed prior to August 10, 1972 (S.A. 42), it was not unreasonable for the jury to conclude that at least part of the proceeds of these checks in fact belonged to the creditors of Stafford.³

Moreover, at best, appellant's claim that he had a "bona fide belief" (App. 19), that these checks were in fact his property, depends solely on his own testimony, which the jury had good reason to discredit, particularly since he made no effort to seek any legal advice as to who was entitled to the proceeds of the check (S.A. 294).

Count Nine

The facts show that on August 25, 1972, the Sperry Gyroscope Division (hereinafter Sperry) issued a check in the amount of \$236.75 to Stafford (Gov. 37; S.A. 46), that on September 1, 1972, Sperry issued an additional

³ This, of course, is all that is required to justify conviction.

check in the amount of \$200.29 to Stafford (Gov. 39, S.A. 48), and finally that on September 22, 1972, Sperry issued a third check in the amount of \$1,122.43 to Stafford—(Gov. 35; T. 471). Only the concealment of the September 22, 1972 check for \$1,122.43 was the subject of Count Nine.

While all three checks were issued after August 10, 1972, the date Stafford was adjudicated bankrupt, and were in payment for work primarily completed before that date, Max Goldhaber, the trustee, was never informed of the existence of any of these three checks (T. 67-68). The record reveals that George Moss had in fact cashed these checks at the "no questions asked" H & S Cash Checking Service (A. 197-99, 206), despite his knowledge that these checks in fact belonged to the creditors of Stafford (S.A. 173):

Q. Well what was the total amount of the checks that you cashed that belonged to Stafford, that you cashed and [claim you] gave to the employees? Give me a round number if you don't have it in an exact number.

A. About \$1500.00

Q. What checks are you referring to?

A. Sperry Gyroscope checks. (S.A. 173).

While Moss claimed that he used this money to pay his employees, there was no evidence that all of the employees had been paid (S.A. 207). Moreover, this self-serving testimony, even if true, hardly establishes a defense to the charge of unlawfully concealing assets. It was not for appellant Moss to decide which creditors were to be given a preference.

Counts Eleven and Twelve

Count Eleven and Count Twelve are similar in nature in that they both charged Moss with intentionally and fraudulently withholding from the Trustee documents relating to property which in fact belonged to Stafford (A. 1419).

The subject of Count Eleven was the registration papers for the G.M.C. truck that was subject of Count One and Count Two, while the subject of Count Twelve was the registration papers for the station-wagon that was the subject of Count Three and Count Four.

Max Goldhaber, the trustee, testified that he had never received a registration for either the G.M.C. truck (S.A. 11) or the station wagon; but that receipt of such types of documents was not only quite common, but required whenever a vehicle was the subject of an auction sale. He stated that without the registration the auctioneer could not transfer title (S.A. 11, 12). While appellant concedes that the evidence certainly indicated Moss' involvement at least in the post-bankruptcy concealments of the truck and the station-wagon (Br. pp. 4, 7), he somehow maintains that Moss did not conceal the registrations to either of these vehicles. In a rather strained exercise of intellectual gymnastics, the appellant reasons that since Moss did not have actual possession of the documents (A. 33-34) he could not have concealed them. Certainly appellant does not argue that Moss had no knowledge of the existence of the truck registration for he admits that Moss had signed it (A. 33-34). Appellant obviously confuses the word custody with control. While actual custody of these documents was admittedly in the person of long-time Stafford employee Arpad Seifer (A. 33-34), ultimate control over the documents was in the hands of George Moss, the

President of Stafford, and the man responsible for the fraudulent sales of the truck and the station wagon to the imaginary John Maxwell and ultimately, the purchase from Maxwell by American Identification (S.A. 241-276).

Equally tenuous is appellant's assertion that the evidence on Count Twelve is insufficient because the registration document for the station wagon was not introduced into evidence "nor was there any evidence that the vehicle was registered that year" [1972] (Br. p. 20). But the evidence that the document existed and was concealed is overwhelming. Indeed, appellant's brief specifically refers to the probative testimony of employee Seifer on this point (Br. p. 19, A. 33-34);

Q. Did you keep the registration to the truck in your possession at all times?

A. Yes.

Q. The same as the key?

A. Yes.

Q. What about the stationwagon?

A. The stationwagon also.

Q. The same thing?

A. Yes. (A. 33-34).

Equally revealing is Seifer's testimony in which he stated that he had driven the station wagon in the course of Stafford business on numerous occasions during the period in question (S.A. 13, 16). Supportive of Seifer's testimony that this car was being used by Stafford, was the testimony of Moss' own brother, Nat Moss, who stated that the vehicle had been driven on Stafford business on numerous occasions as far south as Florida and as far north as Canada (S.A. 387-8).

The evidence also showed that early in January of 1973 Moss had acquired insurance on both the station wagon and the truck (S.A. 61-6, 279). Further, a check with the Department of Motor Vehicles by F.B.I. Agent Kay revealed the fact that the same station wagon was registered during the year 1974-1975 (S.A. 68-70). A copy of the actual registration signed by George Moss was admitted into evidence as Government's Exhibit 68 (S.A. 69).

Clearly, it was not unreasonable for the jury to infer that this station wagon was registered during the year 1972-73. Nor, viewing all the evidence in a light most favorable to the United States, was it unreasonable for the jury to conclude that Moss had in fact concealed from the trustee both the registration of the truck and the registration of the station wagon.

Count Fourteen

In this count, Moss was charged with conspiracy with co-defendant Arnold Rubin, and others unknown, to commit offenses in violation of 18 U.S.C. § 152. Although co-defendant Rubin was acquitted on this count, there was overwhelming evidence of a conspiracy between Moss and a number of persons who were not named in the indictment.

The evidence, for example, showed that Nat Moss had been the Vice President of Stafford (S.A. 80), and the plant manager of American Identification (S.A. 382). He was present at the auction sale, at which he purchased various items on behalf of American Identification (S.A. 383). On cross-examination, he admitted that the Clark fork-lift, the subject of Count Six, was not present at the auction (S.A. 394), but that it was subsequently used and operated at the American Identification plant

(S.A. 394). Although he had admittedly testified before the Bankruptcy Court on numerous occasions (S.A. 390), Nat Moss did not report the strange disappearance and reappearance of the Clark fork-lift (S.A. 394).

On direct examination, Nat Moss stated that not only was he present when his brother had allegedly paid off the employees in cash (S.A. 384-6), but that he himself had handed many of these people money (S.A. 384). Part of this cash was stated by George Moss to be the money from the Sperry Gyroscope checks, Count Nine, and the Surlless checks, Count Eight and Count Ten.

Moreover, Nat Moss had in fact directed the removal of the 1969 station wagon, the subject of Count Two, to his mother's backyard during the period preceding the tagging (S.A. 389-391). He further admitted that some time in early January 1973, he had obtained insurance on the vehicle (S.A. 397). The evidence also showed that it was Nat Moss who had directed the Hilbandt Auto Body Shop to paint the 1967 G.M.C truck, the subject of Counts One and Two, a dark blue color, thus covering all indicia of Stafford ownership (Gov. Ex. 71; S.A. 24-27). His explanation for the sudden reappearance of the truck which admittedly had not been purchased at the auction was that his brother George simply informed him that the truck had become available (T. 1630). Yet according to George Moss Nat knew full well that the truck had been stored at S & M (S.A. 278).

Clearly the jury was entitled to believe that many of the events which transpired were the result of something other than mere coincidence, but had occurred as the end result of an elaborately designed plan between two brothers to defeat the bankruptcy law.

Moreover, along with the evidence relating to Nat Moss, American Identification was clearly a second co-

conspirator, as the evidence overwhelmingly showed. It was American Identification who purchased the truck and the station wagon from John Maxwell (Gov. Ex. 80; S.A. 249-51). It was on the premises of American Identification that the F.B.I. found the fork-lift, (Count Six) (A. 134, 162-6) and the press (Count Seven) (A. 136-44, 156-62), all of which had not been purchased at the auction sale (A. 112, 126; T. 592-595).⁴

ARGUMENT

POINT I

The Evidence Was Sufficient to Sustain the Conviction of the Defendant on all but Count Three.

The defendant concedes that the evidence was sufficient to sustain the conviction of appellant Moss on Counts Two, Four and Nine. This would sustain the six month term of imprisonment which was imposed to run concurrently on each count and a fine of \$3,000.00. We have carefully detailed the evidence on the remaining counts at pp. 3-21, *supra*, and believe that, except for Count Three, it is plainly sufficient to sustain the conviction on each of them.

⁴Count Thirteen, which for the sake of brevity we have not extensively discussed, charged American Identification with fraudulently receiving a material amount of property from a bankrupt.

POINT II

The Untimely Claim of the Appellant Moss that the Convictions on the Substantive Counts Were Multiplicitous Does Not Entitle Him to any Relief.

1. The appellant argues that "[i]mpermissible multiplicity in several facets is apparent in the judgment against Moss based on eleven counts under a single statutory scheme" (Br. 26). Accordingly, "with respect to all the acts set forth in the substantive counts, a conviction on one count only is defensible" (Br. 29). Moreover, he argues, "[i]f that argument does not persuade, then at the least Counts Eleven and Twelve (relating to the documents) cannot stand since they merge into the counts of concealing the vehicles. Furthermore, neither Counts One and Two nor Counts Three and Four can stand together, since they refer respectively to one continuing course of conduct of concealing the same piece of property" (Br. 29).

The claim of multiplicity was not raised at trial, as the appellant concedes (Br. 29), and it is settled law that any claim of multiplicity of an indictment is waived unless timely raised. *United States v. Private Brands, Inc.*, 250 F.2d 554, 557 (C.A. 2, 1975), *certiorari denied*, 355 U.S. 957 (1958). Where, however, an indictment is multiplicitous, a sentence may not be imposed in excess of that which would have been convicted of a single offense—and this would seem so whether or not the issue has been timely raised. In *United States v. Private Brands, Inc.*, *supra*, for example, although the opinion does not indicate the sentence that was imposed, the record in the district court shows that the corporate defendant was fined \$100.00 on each of 21 allegedly multiplicitous counts for a total fine of \$2100.00 and that the individual defendant was placed on probation for one

year and also fined \$100.00 on each count for a total fine of \$2100.00. In holding that the defendants were entitled to no relief, Judge Swan observed (250 F.2d at 557):

"[A]ny objection as to multiplicity of the indictment was waived by not raising it before trial, *Anderson v. United States*, 6th Cir., 189 F.2d 202, 204. Since the appellants could have been fined \$10,000 on any one count and Carey could have been given a prison sentence under 18 U.S.C.A. § 1001, it is obvious that they have not been prejudiced by the sentences imposed."

See, also, *United States v. White*, 417 F.2d 89, 94 (C.A. 2, 1969).

Here the appellant Moss received a sentence of six months to be served concurrently on each of the substantive counts and a fine of \$1,000 on each count for a total fine of \$11,000.⁵ The maximum sentence which could have been imposed on a single substantive offense was five years imprisonment and a \$5,000 fine (18 U.S.C. § 152). Since the total term of incarceration was for less than could have been imposed upon conviction of the substantive offense, it is "obvious" that the defendant has "not been prejudiced by the sentence imposed". *United States v. Private Brands, Inc.*, *supra*, 250 F.2d at 557.⁶ On the other hand, any fine in excess of \$5,000 would be improper, and hence the issue raised by the appellant must be considered on its merits, despite the absence of a timely objection.

⁵ The appellant was fined an additional \$1,000 on the conspiracy count, but there is, of course, no claim that the sentence on this count must merge with the substantive offense.

⁶ The same result would also follow under the concurrent sentence doctrine. See *Barnes v. United States*, 412 U.S. 837, 848, n. 16 (1973).

2. We begin our discussion of the merits by conceding that the offense of concealment in contemplation of bankruptcy, although a separate and distinct offense which is completed when the act of concealment is performed with the requisite intent (*United States v. Knickerbocker Fur Coat*, 66 F.2d 338, 390 [C.A. 2, 1933]), merges with the offense of concealing assets after the bankruptcy petition has been filed. The offense of concealing assets in contemplation of bankruptcy is apparently an inchoate crime, analogous to an attempt to commit a substantive crime and should properly merge upon conviction of the substantive offense. Accordingly, we agree that the convictions of concealment in contemplation of bankruptcy alleged in Count One merges with the conviction of the concealment of the same property alleged in Count Two. Similarly, for the same reasons, the conviction on Count Three would have merged with the conviction on Count Four, but for our concession that the evidence is insufficient to sustain the conviction on Count Three.

Moreover, we likewise agree that convictions on Count Eleven and Count Twelve, which allege the concealment of the documents relating to the two vehicles that Counts Two and Four allege were concealed improperly, merge with Counts Two and Four. The situation here, we believe, is analogous to a charge of filing a false tax return and a charge of evading taxes. Where the filing of the false return is merely the means by which the evasion is accomplished, it has been held that a conviction on the false statement merges with the conviction on the evasion count, and it is impermissible to accumulate penalties in excess of that authorized for the evasion count. *United States v. White*, 417 F.2d 89, 94 (C.A. 2, 1969). Here, the concealment of the documents evidencing the bankrupt's ownership of the concealed property was simply part of the means by which the

offense of fraudulent concealment was accomplished. Accordingly, the holding in *United States v. White* would seem to clearly suggest that each count alleging the concealing of documents should merge with each count of concealing the property to which the documents related.

We, therefore, agree in summary that Counts One to Four and Counts Eleven and Twelve merge and permit a sentence to be imposed no greater than that which could have been imposed had the defendants been convicted of Counts Two and Four, i.e., a maximum fine of \$10,000. Here the total fine on these counts was \$4,000—and *United States v. Private Brands, Inc., supra*, makes it clear that the defendant has not been “prejudiced by the sentence imposed” (250 F.2d 557).

3. This brings us to the broader merger argument made by the defendant, i.e. that a defendant may only be convicted of one charge of concealing property even though he has undertaken several independent acts of concealment with respect to different property. We do not agree with this argument which, if correct, would justify a maximum sentence equal to that permitted on one substantive concealment count.

The principal authority cited by the appellant is *Edwards v. United States*, 265 F.2d 302, 306 (C.A. 9, 1959), in which the Court of Appeals observed:

“We hold that in law and in fact the eight charges constitute but one offense against each appellant. The eight counts were drawn under the first paragraph of Section 152. . . . It is clear to us . . . that Congress did not intend to denounce as a separate offense the concealment by the accused . . . of each separate piece, item or type of property . . . but clearly intended to characterize as one offense the fraudulent concealment by an accused of property belonging to the estate of a bankrupt.”

The appellant, however, prematurely concludes his discussion of construction placed by the Court of Appeals for the Ninth Circuit on Section 152, for in a subsequent case, quite similar to the instant case, it explained that the holding in *Edwards* was not as broad as the language quoted would suggest. *United States v. Kaldenberg*, 429 F.2d 161 (C.A. 9, 1970), *cert. denied*, 404 U.S. 929.

There the defendant was convicted of several counts of concealing various rental payments received after the filing of the bankruptcy petition which he improperly concealed and converted to his own use. Relying on *Edwards v. United States*, *supra*, and the line of authority it had spawned, the defendant argued that "the receipt and retention of seven different payments constituted but one crime" (429 F.2d at 163). In rejecting this claim the Court of Appeals observed (429 F.2d at 163):

"In *Edwards*, the substance of the offense charged in each of the counts, on which appellants were convicted, was the failure of each appellant to reveal or disclose property belonging to the bankrupt. There was only one concealment, even though several different items of property were involved. The property in question had been removed to Canada prior to the bankruptcy proceedings. Here, of course, there were seven entirely separate and distinct concealments, each of which occurred after the petition had been filed. Each time appellant received the rental payment a new set of facts arose and he was confronted with a new decision on whether to transfer the new assets to the receiver or to conceal them. Clearly, a separate and distinct state of facts are here involved in each count."

⁷ The Court of Appeals in *United States v. Kaldenberg*, *supra*, went on to reject the defendant's reliance upon 18 U.S.C. 3284, which also is relied upon here (429 F.2d at 163-164).

In the present case, three of the seven remaining substantive counts of concealment (taking into account the merger discussed above) are absolutely indistinguishable from *United States v. Kaldenberg*; for like that case, Counts Eight, Nine and Ten involve the conversion of checks received on three separate occasions after the bankruptcy proceeding began. Accordingly, there can be no doubt even under the holdings of the Court of Appeals for the Ninth Circuit upon which the defendant relies, that the convictions on these three counts, which authorize a maximum fine of \$15,000, is entirely proper. Moreover, as we have earlier shown, the remaining property concealed, which is alleged in Counts Two, Four, Six and Seven, did not simply involve a failure to disclose assets, but separate affirmative acts of concealment, such as the fraudulent transfers involved in Counts Two and Four, the special effort made to conceal the fork-lift in Count Six, and illegal transfer of the Benchmaster presses alleged in Count Seven.

Under these circumstances, all seven remaining substantive counts, excluding Count One, Three, Eleven and Twelve, were plainly not multiplicitous and justified separate sentences even if they were part of a common fraudulent scheme. Compare, *United States v. Calvert*, 523 F.2d 895 (C.A. 8, 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. Eskow*, 422 F.2d 1060 (C.A. 2, 1970), *cert. denied*, 398 U.S. 959 (1970). Moreover, since the maximum fine which could have been imposed on these counts is ~~\$25,000~~ \$15,000 and the defendant was fined only \$11,000, the merger of Counts One, Three, Eleven and Twelve does not affect the validity of the sentence.*

* The remaining authority relied upon the appellant is inapposite here. The line of cases exemplified by *Prince v. United States*, 352 U.S. 322 (1957), has been limited to its peculiar facts, because the Supreme "Court was dealing there 'with a

[Footnote continued on following page]

POINT III

The Use Made of Appellant Moss' Prior Bankruptcy Testimony to Which No Timely Objection Was Taken Was Entirely Proper.

The appellant Moss was examined by the bankruptcy referee and pursuant to 11 U.S.C. § 25(a)(10) "no testimony, or any evidence which is directly or indirectly derived from such testimony given by him shall be offered in evidence against him in any criminal proceeding * * *." Of course, no testimony given by the appellant Moss was "offered in evidence" against him nor was any derivative use made of his testimony. Indeed, until appellant Moss testified at the trial, the Assistant United States Attorney never even examined the transcript of the earlier testimony. Moreover, the testimony, as would be expected of someone engaged in a carefully

unique statute of limited purpose". *Gore v. United States*, 357 U.S. 386, 391-392 (1958). Similarly inapposite is the line of authority represented by *Bell v. United States*, 349 U.S. 81 (1955), which held that "where interstate transportation of something is forbidden, only one unit of prosecution is present even though the defendant transported more than one prohibited item in the single interstate shipment". *United States v. Long*, 524 F.2d 660, 661 (C.A. 9, 1975). There, however, the basis on which Congress was legislating was the interstate transportation, "[s]ince there was only one instance of interstate movement, it was proper to hold that this was the unit of prosecution which Congress had intended" (524 F.2d at 662). This reasoning under an entirely different criminal statute is not "necessarily helpful" or binding here. *Rayborn v. United States*, 234 F.2d 368, 370 (C.A. 6, 1956), *Stewart, J.*

Although Section 25(a)(1) confers such "immunity" solely upon a "bankrupt" who testified, appellant was entitled to the immunity because he was "apparently designated as one of the corporate officers required to perform the duties of the bankrupt * * *." *United States v. Dornau*, 491 F.2d 473, 479, n. 10 (C.A. 2, 1974).

planned scheme to conceal assets from his creditors, was entirely exculpatory. Had the United States offered that testimony on its direct case and rested, the appellant would have been entitled to a directed verdict of acquittal.

The only use that could possibly be made of the appellant's wholly exculpatory testimony in the bankruptcy proceeding was by showing that it was false, for that would show guilty knowledge and undermine the appellant's credibility as a witness. No effort, however, was made to do even that on the direct case, although the prior testimony, some of which the appellant flatly admitted was false (S.A. 270-1), was used to impeach his credibility when he took the stand and attempted to convince the jury that any act of concealment was not undertaken with requisite criminal intent.

The primary issue presented here is whether such use of his prior testimony was proper. We believe that it was, and that the absence of any timely objection deprives appellant of the right to raise the issue on appeal.

A. The Protection Afforded By the Self-Incrimination Clause

We may concede for the present purposes that the appellant's prior testimony was "compelled" within the meaning of the Self-Incrimination Clause, although the appellant testified voluntarily without asserting the privilege against selfincrimination (cf. *United States v. Dornau*, 491 F.2d 473, 479 [C.A., 1974], and as a consequence, he received both the protection afforded by the Self-Incrimination Clause and Section 25(a)(10). We examine here whether the protection accorded by the Self-Incrimination Clause precludes the use of prior testimony that was made here.

1. The law seems reasonably well settled that the use of the appellant's prior "compelled" false testimony here was proper. Perhaps the leading case establishing this principle is *United States v. Kahan*, 415 U.S. 239 (1974). There, at the defendant Kahan's arraignment for improperly receiving gratuities for official acts and for perjury before the grand jury, counsel was appointed to represent him at his request and after he stated he was without funds. Moreover, he failed, in response to a question whether he had funds to employ an attorney, to disclose that he had access to certain savings accounts in which he had deposited \$27,000.00. During the case-in-chief at his trial, his statements as to lack of funds were admitted as false exculpatory statements evidencing his consciousness that the bank deposits were incriminating, and as evidence of willfulness in making statements before the grand jury with knowledge of their falsity.

The issue squarely presented was whether the statements made in order to secure the assistance of counsel could be used as *evidence* during the case-in-chief. The defendant had argued, relying upon *Simmons v. United States*, 390 U.S. 377 (1968), that he should not be deemed to have waived his privilege against self-incrimination when he spoke only to vindicate his Sixth Amendment right to counsel. See, *United States v. Branker*, 418 F.2d 378 (C.A. 2, 1969).

The Supreme Court, accepting for the purpose of its decision that truthful statements of a defendant made for the purpose of obtaining counsel could not be used against the defendant, nevertheless held that false testimony was not subject to such use immunity. Mr. Justice Blackmun, writing for the majority, reasoned that *Simmons* barred only "the use of pretrial testimony to prove its incriminating content." But, by contrast in the case before it, "the incriminating component of respondent's pretrial statements derives not from their

content, but [from their falsity] and respondent's knowledge of their falsity" (415 U.S. at 243). "The protective shield of *Simmons*", he concluded, "is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood. Cf. *Harris v. New York*, 401 U.S. 222, 226 (1971)."

Of course, it is also settled law that a person who is compelled to testify under a grant of use immunity, only enjoys such immunity with respect to its use to prove its truthful incriminating content. If he gives false testimony, he loses the benefit of the bargain and he may be prosecuted for perjury. See, e.g., *Glickstein v. United States*, 222 U.S. 139 (1911). But, as even Mr. Justice Marshall observed in his dissenting opinion in *United States v. Kahan*, *supra*, 415 U.S. at 248: "If the defendant's wilfully false statement can be used against him at a subsequent perjury trial, I see no reason why it cannot be used against him at his pending criminal trial."¹⁰

Neither did this Court in *United States v. Tramunti*, 500 F.2d 1334 (C.A. 2, 1974), *cert. denied*, 419 U.S. 1079. There, prior false immunized testimony was not only admitted to impeach the credibility of the defendant, who was on trial for an unrelated perjury

¹⁰ The basis of Mr. Justice Marshall's dissent was the absence of a finding by the trial judge that statements claimed to be false were made wilfully. Of course, the majority did not accept this approach, but in our case the defendant admitted that at least some of his prior testimony was flat out perjurious, and having voiced no objection to its use, he is hardly in a position to fault the district court judge for failing to make a preliminary inquiry. Moreover, the critical fact that Mr. Justice Marshall ignores, is that unless the jury was satisfied Kahan lied deliberately in his earlier testimony, it is not likely that the jury would use it against him.

charge, but also as evidence-in-chief of a prior similar act bearing on the issue of the defendant's guilty knowledge. In so holding, this Court observed (500 F.2d at 1343-44):

"The immunity granted by the Constitution does not confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed."

The *Kahan-Tramunti* line of authority is plainly applicable here. Indeed, here the false immunized testimony by the appellant was simply another overt act in his scheme to unlawfully conceal his assets. The crime of concealing assets charged here, is therefore the legal equivalent of a perjury charge. Accordingly, it was permissible to make far greater use of appellant's prior testimony than merely to impeach his testimony at trial.

2. The appellant's efforts to avoid the force of this line of authority is hardly persuasive. The appellant does not discuss *United States v. Kahan, supra*, and he seeks to limit *Tramunti* to its peculiar facts, by asserting that it stands for no more than the proposition that "testimony given under immunity may be utilized on cross-examination where the prosecution is for perjury in a proceeding subsequent to that in which the immunized testimony was given and where a defense to the charge of perjury in that subsequent proceeding may be rebutted by showing prior similar acts of perjury in the earlier immunized proceeding" (Br. 37).

The appellant, however, offers no reasoned argument as to why the holding in *Tramunti* should be so limited. True, he points to a footnote in the *Tramunti* opinion which, citing "language" in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 350, n. 10, lends some arguable support to appellant's position. There, in *Tramunti*, Judge Mulligan observed in a footnote (500 F.2d 344, n.5):

"Appellant's reliance on *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 83 S.Ct. 448, 9 L.Ed. 2d 357 (1963), is misplaced. Appellant urges that the case is authority for the proposition that grand jury evidence, even if false or evasive, is entitled to fifth amendment protection. However, the language relied upon refers to use of compelled testimony in the prosecution of the underlying crime which had been the subject of the investigation, and not, as here, to its use in an unrelated prosecution for perjury. 371 U.S. at 350 N. 10, 83 S.Ct. 448, 9 L.Ed.2d 357."

But the "language" in *Shotwell Mfg. Co. v. United States*, to which Judge Mulligan referred, is "dictum"¹¹ which can hardly be justified by any principled analysis—after all, if the witness can be prosecuted for perjury, as Mr. Justice Marshall asked in *United States v. Kahan*, *supra*, 415 U.S. at 247-248, why cannot a lesser use be made of his false testimony as evidence of an element of another offense which requires more than just proof of the falsity of the immunized testimony. Moreover, the unexplicated dictum in *Shotwell* is not only inconsistent with *United States v. Kahan*, but by its terms would only make such false testimony "inadmissible as evidence" (371 U.S.

¹¹ The part of the opinion in *Shotwell* in which this language appears was so characterized by its author. *Miranda v. Arizona*, 384 U.S. 436, 506, n. 12 (1966), dissenting opinion of Harlan, J.

at 350, n. 10). Here the prior false immunized testimony was used solely to impeach.¹² Cf. *Harris v. New York*, 401 U.S. 222 (1971); *United States v. Housand*, 550 F.2d 84 (C.A. 2, 1977).

The only policy argument which appellant makes against such use of immunized testimony is that "allowing immunized former testimony for purposes of impeachment on the ground that the testimony was untruthful would involve a further enormous complication." A cross examination, he suggests, "that failed to show the former testimony to be untruthful beyond a doubt would amount to an impropriety of constitutional dimension, and a mistrial would have to be declared in such circumstances that double jeopardy doctrine would bar a retrial" (Br. 38). Of course this "horror" would apply equally to the holding in *Tramunti* even under appellant's limited reading of it. The dire consequences which appellant predicts, however, do not follow ineluctably from the result we urge here.

Where a timely objection is made, as the Supreme Court observed, in *United States v. Kahan*, *supra*, the initial determination as to the falsity of the prior testi-

¹² While this Court may be of course bound to follow the holdings of the Supreme Court until explicitly overruled, it is hardly compelled to give such adherence to unexplicated dictum which has undermined by subsequent authority. Compare *United States v. Toscanino*, 500 F.2d 267, 275 (C.A. 2, 1974).

Moreover, the dictum in *Shotwell* may be explained in a manner consistent with the position we urge here. The critical sentence in *Shotwell* reads as follows: "Under the rule of *Rogers v. Richmond*, *supra*, the truth or falsity of such a [compelled] disclosure would then be irrelevant to the question of admissibility" (371 U.S. 350 n. 10). In *Rogers v. Richmond*, 365 U.S. 534, the Supreme Court held only that a coerced confession was not admissible even if it is true. Accordingly, all that the Supreme Court was saying in *Shotwell* was that an *incriminating* statement, compelled under a grant of use immunity, whether true or false, is inadmissible.

mony can be made by the district court outside the presence of the jury (415 U.S. 243, n. 3).¹³ Moreover, in a case such as this, or *United States v. Kahan, supra*, where the prior testimony is wholly exculpatory, the only use that can be made of it, as a practical matter, is by convincing the jury that it is false. Indeed, the most devastating impact of the prior testimony here came when the appellant admitted that his testimony was a lie. Here, as *Kahan* and *Tramunti*, if the prior statements were true, they would not have been used.¹⁴

The appellant's final suggestion that such use of his prior false testimony "would exact the penalty of chilling the defendant's right to testify on his own behalf at any subsequent trial" (Br. 32), is frivolous. The Constitution has not yet been construed to permit a defendant to testify, free from impeachment by cross-examination, even if his testimony "may open the door to otherwise inadmissible evidence which is damaging to his case." *McGautha v. California*, 402 U.S. 133, 213 (1971); *United States v. Kahan*, 415 U.S. 239 (1974); *Harris v. New York*, 401 U.S. 222 (1971); *United States v. Tramunti*, 500 F.2d 1334, 1344 (C.A. 2, 1974), *cert. denied*, 419 U.S. 1079.

B. The Protection Afforded By The Statute

Section 25(a)(10) of Title 11, the "immunity" statute here at issue is a somewhat unique statute both in its

¹³ We do not agree that the finding of falsity need be "beyond a doubt." Compare *Lego v. Twomey*, 404 U.S. 477 (1972) with *United States v. Hendrix*, 505 F.2d 1233, 1236 (C.A. 2, 1974).

¹⁴ The case is thus unlike *United States v. Hockenberry*, 474 F.2d 24 (C.A. 3, 1973), cited by the appellant, where the United States sought to offer truthful immunized testimony in which the defendant admitted to prior perjury in order to discredit him as a witness.

history and language. When originally enacted as part of the Bankruptcy Act of 1898, it provided only that no testimony given by the bankrupt could be "offered in evidence" against the bankrupt in a subsequent criminal proceeding, and did not specifically preclude any derivative use of the testimony. The Supreme Court in *Ardenstein v. McCarthy*, 254 U.S. 71, 73 (1920) held that the only immunity afforded was that specifically conferred by the language of Section 25(a)(1). Accordingly, a witness who testified without objecting to the lack of derivative use immunity got only what the statute gave him. *United States v. Dornau*, 491 F.2d 473, 479 (C.A. 2, 1974).

Moreover, unlike the general immunity statute (18 U.S.C. § 6002), which provides that compelled testimony may not "be used against the witness", Section 25(a)(10) merely provides that prior testimony may not be "offered in evidence" against him, and, since 1970, provides a similar proscription against the admission of evidence derived from his compelled testimony. Thus, Section 25(a)(10) has been held to provide no more than "a rule of competency of evidence which may or may not be insisted upon". *Burrell v. Montana*, 194 U.S. 572, 577 (1904), emphasis supplied. Accordingly, it may be plausibly argued, in light of both the history of Section 25(a)(10) and its language, that the only restriction on the use of the prior testimony—whether true or false, was to prohibit it from being "offered into evidence" at subsequent criminal proceedings, and not from being used to cross-examine appellant. Because here as in *United States v. Dornau*, *supra*, appellant testified without claiming that the restrictions on the use of his testimony were inadequate, he got only what the statute gave him.

We do not believe, however, that it is necessary to go this far in order to sustain our position. The immunity

statute here is all but identical to the one at issue in *United States v. Tramunti*, *supra*, 500 F.2d at 1344-1345, in which it was held that "it is the incriminatory truth not otherwise available which is at the heart of the immunity intended to be established by the Congressional enactment" (500 F.2d at 1345). Here as we have shown, the statements made by the appellant were not used for their incriminatory truth, and the use of it that was made depended on the appellant's admission that they were false or the conclusion of the jury that they must have been false.

The only authority cited by the appellant for the proposition that Section 25(a)(10) prohibits the use of his prior false testimony for impeachment is an early opinion of the Court of Appeals for the First Circuit in *United States v. Jacobs*, 161 F. 694 (1908), which stated (161 F. at 700):

"The underlying philosophy of the statute in question is that, as a matter of justice to the bankrupt, and also for the interest of creditors, he should be encouraged to testify freely in his examination; but he would have no encouragement thereto if, on being prosecuted for an offense, he could not undertake to absolve himself by his own testimony except at the risk of being tripped or embarrassed by what he had previously sworn to."

We find this reasoning hard to follow as applied to a case such as the present one. Here it is plain from comparing appellant's immunized testimony with his trial testimony and the other evidence introduced at trial, that his immunized testimony was nothing short of an overt act in his scheme to conceal his assets from his creditors. Had he been truthful and candid, his testimony would have been of no use. To say that such concededly perjuri-

ous testimony could not be used to impeach his later testimony,¹⁵ can only encourage bankrupts to testify falsely rather than candidly in the bankruptcy proceeding. What encourages candor is a ban on the use of any incriminatingly truthful testimony—no such use was made here.

Moreover, the opinion in *United States v. Jacobs*, *supra*, and the follow-up opinion in *Alkon v. United States*, 163 F. 810, 813-814 (C.A. 1, 1908), does not indicate whether or not the prior testimony allegedly used improperly to impeach was incriminating truthful testimony or false exculpatory testimony. Indeed, in *Alkon* it does not appear that the minutes of the trial were fully transcribed, and the basis of the reversal was apparently the continued repeated use of earlier testimony over objection.

Finally, *United States v. Jacobs*, *supra*, was decided prior to the opinion in *Ardenstein v. McCarthy*, 254 U.S. 71 (1920) in which the Supreme Court held that restriction on the use of testimony obtained pursuant to Section 25(a)(10) was limited to that literally conferred and did not apply to afford derivative use immunity. The holding in *Ardenstein v. McCarthy*, *supra*, is plainly inconsistent with the rationale of *Jacobs*, for it is surely

¹⁵ The appellant argues that while the cross-examination "revealed beyond a doubt that *some* of the former testimony was untruthful, for Moss admitted that, *** there were occasions when Moss vehemently denied that the prior testimony was false and where no demonstration at all was made of its falsity" (Br. 39). While we do accept appellant's argument that no "demonstration at all was made of its falsity", assuming that is so, and that an admission by the defendant is critical, any error was harmless in light of the admissions of perjury that he did make, as well as the other evidence, including instances where he admitted to preparing false affidavits and swearing falsely (see, *supra*, pp. 5-7).

anomalous to say that the policy of encouraging full disclosure would have permitted the United States to use truthful incriminating testimony to obtain other evidence but preclude the use of false exculpatory testimony to impeach the witness at a subsequent trial.

We believe, in sum, that *United States v. Jacobs* is distinguishable from the present case, and to the extent that it is not, is inconsistent with *United States v. Tramunti, supra*, and *Ardenstein v. McCarthy, supra*, and should not be followed.

C. The Absence of an Objection

The appellant failed to assert any objection prior to the use of the testimony, allegedly because his trial counsel was "personally unaware" of the Section question^{25(a)(10)}, although when trial counsel began alluding to bankruptcy testimony, in his direct examination, the Assistant United States Attorney gave him the warning contained in the "practice pointers to Anno: *Criminal Law-Bankruptcy Evidence*, 22 A.L.R. Fed. 643, 651, "that if Mr. Taikeff asks the next question, which I anticipate will have to do with bankruptcy proceedings before the Bankruptcy Court, I wish the Court to recognize that the Government will take the position that any privilege under the Fifth Amendment will be * * * waived" (A. 165).¹⁶

¹⁶ The "practice pointer" alluded to earlier (22 A.L.R. Fed. at 651) reads as follows:

In addition to being alert to the necessity of making objection to the use of the bankrupt's examination testimony in subsequent criminal proceedings, counsel should exercise care in examining and cross-examining witnesses to avoid inadvertently touching upon the bankrupt's testimony given on examination. This is extremely important because the immunity afforded by § 7 of the Bankruptcy Act may be waived by such questions and the prosecution will then be permitted to examine the witness as to further testimony given by the bankrupt at his examination.

Whether or not his counsel was aware of the issue, however, the failure to raise the objection precludes the appellant from raising the issue here, both as a matter of statutory construction and the application of traditional procedural rules.

In *Burrell v. Montana*, 194 U.S. 572 (1904), the Supreme Court, speaking of the protection afforded by Section 25(a)(10), observed that the statute "provides a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted, its probative force cannot be limited." *Accord: Bain v. United States*, 262 F. 664, 669 (C.A. 6, 1920), *cert. denied*, 252 U.S. 586 (1920); see, also *Kritcher v. United States*, 17 F.2d 704, 706 (C.A. 2, 1927).

The construction of Section 25(a)(10), aside, it is settled law that an objection to admissibility of evidence must be timely made and will be considered on appeal only if it constitutes plain error which must be corrected "to prevent a miscarriage of justice". *United States v. Viale*, 312 F.2d 595, 601 (C.A. 2, 1963); *United States v. Indiviglio*, 352 F.2d 276, 279-281 (C.A. 2, *en banc*, 1965), *cert. denied*, 383 U.S. 907; *United States v. Rose*, 525 F.2d 1026, 1027 (C.A. 2, 1976); but cf. *United States v. Tramunti*, *supra*, 500 F.2d 1339-1342.¹⁷

¹⁷ In *United States v. Tramunti*, *supra*, the Court considered a claim such as that here, which was raised for the first time on appeal, where the United States Attorney failed to advise defense counsel until after trial that the prior testimony was given under a grant of immunity. Here it is conceded that the defense was provided with such information prior to trial (A. 270-82). Moreover, although his statement might have been clearer at trial, the Assistant United States Attorney did more than was necessary to alert counsel to the issue.

The error here, is, of course, hardly "plain"; indeed, from his standpoint it is certainly a close question. See *United States v. Manning*, 448 F.2d 992, 1000-1002 (C.A. 2, 1971), *cert. denied*, 404 U.S. 995 (1971). Moreover, even if this without more is insufficient to defeat the application of the plain error rule (see, *United States v. Tramunti*, *supra*, 500 F.2d 1341-1342), it can hardly be said that error here, if any, resulted in an injustice of sufficient magnitude to warrant invocation of the plain error rule.

The evidence admitted was probative of the appellant's guilt, it did not undermine the integrity of the fact-finding process, and it enabled the truth to come out clearly—an all too rare occurrence in the criminal process. Under these circumstances, the failure to timely raise the issue should preclude its consideration for the first time on appeal, regardless of whether the failure to raise it was negligent or deliberate. *United States v. Indiviglio*, *supra*, 352 F.2d at 281, n. 8.

POINT IV

The Error as to Moss, if any, Did Not Affect the Appellant American Identification Products.

The appellant, American Identification Products, Inc., the beneficiary and recipient of the illegally concealed property, claims that, because the appellant Moss was "prejudiced and pilloried" by his prior testimony, the jury could not have fairly evaluated the evidence against it (Br. 45). This claim is frivolous.

The law is clear that any violation of the appellant Moss' privilege against self-incrimination is purely personal and the co-defendant American Identification Products, Inc. has no standing to complain about it. *United States v. Bruton*, 416 F.2d 310 (C.A. 8, 1969); *cert.*

denied, 397 U.S. 1014; *People v. Varum*, 59 Cal. Rptr. 108, 427 P.2d 772, 776 (Sup. Ct. 1967, Traynor, J.).

Moreover, since Moss was also a principal of American Identification Products, Inc. when he testified in the Bankruptcy Court, it is quite plain the earlier testimony—which was an over act in furtherance of the conspiracy to conceal assets, was admissible against it as evidence-in-chief.¹⁸ And, indeed, it could have been used in much the same way had Moss been called as a witness by the United States in a separate trial. Fed. Rules of Evidence, Rule 607; Rule 801(d)(1). Of course, the evidence of its guilt was so overwhelming, as to render any error harmless.

CONCLUSION

The judgment of the district court, except as to Count Three, should be affirmed.

Dated: June 10, 1977

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

EDWARD R. KORMAN,
*Chief Assistant United States Attorney,
Of Counsel.*¹⁹

¹⁸ The fact that America Identification Products, Inc. was not named as a co-conspirator is immaterial. *United States v. Rinaldi*, 393 F.2d 97, 99 (C.A. 2, 1967).

¹⁹ The United States Attorney wishes to acknowledge the assistance of Charles A. Damato, a second year law student at New York Law School, in the preparation of this brief.

★ U. S. Government Printing Office 1977-714—018—104

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK

} ss

Judith Marie Beckles

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of June 19 77 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Graham Hughs

40 Washington Square South

New York, New York 10012

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Judith Marie Beckles

Sworn to before me this

15 day of

June

19 77

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 19 79

